

LATHAM & WATKINS LLP
Miles N. Ruthberg (Bar No. 086742)
miles.ruthberg@lw.com
Pamela S. Palmer (Bar No. 107590)
pamela.palmer@lw.com
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
Telephone: +1.213.485.1234
Facsimile: +1.213.891.8763

LATHAM & WATKINS LLP
Kimberly Arouh Hicks (Bar No. 163285)
kimberly.hicks@lw.com
Jake Ryan (Bar No. 211899)
jake.ryan@lw.com
Curtis Carll (Bar No. 248470)
curtis.carll@lw.com
Daniel K. Greene (Bar No. 253595)
daniel.greene@lw.com
600 West Broadway, Suite 1800
San Diego, California 92101-3375
Telephone: +1.619.236.1234
Facsimile: +1.619.696.7419

Attorneys for Nominal Defendant
Leap Wireless International, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES GRAHAM, Derivatively on Behalf
of Nominal Defendant LEAP WIRELESS
INTERNATIONAL, INC.,

Plaintiff,

v.

S. DOUGLAS HUTCHESON, AMIN
KHALIFA, GRANT BURTON, DEAN M.
LUVISA, MICHAEL B. TARGOFF, JOHN D.
HARKEY, JR., ROBERT V. LAPENTA,
MARK H. RACHESKY, M.D., and JAMES
D. DONDERO,

Defendants,

and

LEAP WIRELESS INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. 08-CV-0246 L NLS

(Derivative Action)

**NOMINAL DEFENDANT LEAP
WIRELESS INTERNATIONAL, INC.'S
NOTICE OF MOTION AND MOTION
TO DISMISS DERIVATIVE
COMPLAINT**

Judge: The Hon. M. James Lorenz
Courtroom: 14
Hearing Date: August 4, 2008
Hearing Time: 10:30 a.m.

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 4, 2008 at 10:30 a.m., or as soon thereafter as
 3 the matter may be heard, before the Honorable M. James Lorenz, located at the United States
 4 Courthouse, 940 Front St., San Diego, California, Courtroom 14, Nominal Defendant Leap
 5 Wireless International, Inc., will and does hereby move, in the alternative:

6 (a) for a dismissal for lack of prosecution under Federal Rule Civil Procedure 4(m) and
 7 41 for failure to prosecute, or

8 (b) for a dismissal pursuant to Federal Rules of Civil Procedure Rule 23.1 and 12(b)(6)
 9 and applicable Delaware law on the grounds that plaintiff lacks standing because he has failed to
 10 plead compliance with the pre-suit demand requirements and to allege his shareholder status with
 11 particularity, as required in order to assert claims derivatively that are “a right of the corporation”
 12 under rule 23.1. Specifically, (1) plaintiff failed to make a demand on Leap’s board of directors
 13 prior to filing suit and to allege that any such demand was wrongfully refused; (2) plaintiff failed
 14 to plead that making such a demand would have been futile; and (3) plaintiff failed to plead with
 15 particularity that he was a shareholder of Leap continuously from 2004 to 2007 and during the
 16 pendency of this case.

17 This motion is based on this Notice of Motion and Motion, and the accompanying
 18 Memorandum of Points and Authorities, the Request for Judicial Notice and exhibits thereto, the
 19 Declaration of Kimberly A. Hicks, and the contents of the file in this action, and whatever and
 20 further evidence and argument is presented at the hearing of this motion.

21 Dated: May 30, 2008

Respectfully submitted,

22 LATHAM & WATKINS LLP
 23 Miles N. Ruthberg
 24 Pamela S. Palmer
 25 Kimberly Arouh Hicks
 26 Jake Ryan
 27 Curtis Carll
 28 Daniel K. Greene

By s/ Pamela S. Palmer
 Pamela S. Palmer
 Attorneys for Nominal Defendant
 Leap Wireless International, Inc.
 pamela.palmer@lw.com